In the Supreme Court of the United States

OCTOBER TERM, 1970

No.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, APPELLANTS

v.

CITY OF CHICAGO, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The order of the district court (App. A, *infra.*, pp. 11–16) is not yet reported. The report of the Interstate Commerce Commission (App. C, *infra,* pp. 24–41) is published at 331 I.C.C. 447.

JURISDICTION

The judgment of the three-judge court (App. A *infra*) was entered on March 19, 1970. Notices of appeal (App. B, *infra*) were filed by the Interstate Commerce Commission and the United States on May 14, 1970, and May 18, 1970, respectively. The jurisdiction of this Court is conferred by 28 U.S.C. 1253. *City of Chicago* v. *United States,* 396 U.S. 162.

398-034 O—70——1

QUESTION PRESENTED

Whether Section 13a(1) of the Interstate Commerce Act requires a railroad seeking to discontinue its segment of a through passenger train (operated in conjunction with another railroad) to give notice of the proposed discontinuance in states served only by the other railroad.

STATUTE INVOLVED

Section 13a(1) of the Interstate Commerce Act (49 U.S.C. 13a(1)) provides:

> A carrier or carriers subject to this part, if their rights with respect to the discontinuance or change, in whole or in part, of the operation or service of any train or ferry operating from a point in one State to a point in any other State or in the District of Columbia, or from a point in the District of Columbia to a point in any State, are subject to any provision of the constitution or statutes of any State or any regulation or order of (or are the subject of any proceeding pending before) any court or an administrative or regulatory agency of any State, may, but shall not be required to, file with the Commission, and upon such filing shall mail to the Governor of each State in which such train or ferry is operated, and post in every station, depot or other facility served thereby, notice at least thirty days in advance of any such proposed discontinuance or change. The carrier or carriers filing such notice may discontinue or change any such operation or service pursuant to such notice except as otherwise ordered by the Commission pursuant to this paragraph, the laws or constitution of any State, or the decision or order of, or the pend-

ency of any proceeding before, any court or State authority to the contrary notwithstanding. Upon the filing of such notice the Commission shall have authority during said thirty days' notice period, either upon complaint or upon its own initiative without complaint, to enter upon an investigation of the proposed discontinuance or change. Upon the institution of such investigation, the Commission, by order served upon the carrier or carriers affected thereby at least ten days prior to the day on which such discontinuance or change would otherwise become effective, may require such train or ferry to be continued in operation or service, in whole or in part, pending hearing and decision in such investigation, but not for a longer period than four months beyond the date when such discontinuance or change would otherwise have become effective. If, after hearing in such investigation, whether concluded before or after such discontinuance or change has become effective, the Commission finds that the operation or service of such train or ferry is required by public convenience and necessity and will not unduly burden interstate or foreign commerce, the Commission may by order require the continuance or restoration of operation or service of such train or ferry, in whole or in part, for a period not to exceed one year from the date of such order. The provisions of this paragraph shall not supersede the laws of any State or the orders or regulations of any administrative or regulatory body of any State applicable to such discontinuance or change unless notice as in this paragraph provided is filed with the Commission. On the expiration of an

order by the Commission after such investigation requiring the continuance or restoration of operation or service, the jurisdiction of any State as to such discontinuance or change shall no longer be superseded unless the procedure provided by this paragraph shall again be invoked by the carrier or carriers.

STATEMENT

On August 31, 1967, the Chicago & Eastern Illinois Railroad Co. (C&EI) filed a notice under Section 13a (1) of the Interstate Commerce Act (49 U.S.C. 13a (1)) proposing to discontinue a pair of trains, known as the "Georgian," operated by it between Chicago, Illinois and Evansville, Indiana. These trains operated in conjunction with trains of the Louisville & Nashville Railroad (L&N), which ran between Evansville and Atlanta, Georgia. A passenger could thus ride between Chicago and Atlanta, over two railroads, without changing cars.[1]

On January 25, 1968, after hearings, the Commission authorized C&EI to discontinue the trains, finding that continued operation was not required by public convenience and necessity, and would unduly burden interstate commerce. *Chicago & Eastern Illinois Railroad Co.—Discontinuance of Trains, etc.*, 331 I.C.C. 447 (App. C *infra*). The C&EI trains stopped running on February 2, 1968, and have not operated since.

[1] C&EI and L&N also operated in the same manner between Chicago and Montgomery, Alabama. However, no issue was raised below as to this operation.

A suit seeking review of the Commission order was filed in the court below in May 1968. That court dismissed the action in January 1969, holding that the Commission decision was not reviewable. *City of Chicago* v. *United States*, 294 F. Supp. 1103. That decision was subsequently reversed by this Court, which remanded the case to the court below. *City of Chicago* v. *United States*, 396 U.S. 162.

The plaintiffs below then renewed an earlier motion (previously briefed and argued) seeking reversal on the ground that C&EI had not properly given notice in accordance with Section 13a(1). Specifically, they contended that C&EI was required to post notices at various points served by the connecting L&N trains, and to mail notices to the governors of states served by the L&N trains. On February 5, 1970, the lower court entered an order summarily remanding the case to the Interstate Commerce Commission. On March 19, 1970, after various motions, the court vacated its prior order and entered a new judgment remanding the matter to the agency for further proceedings (App. A, *infra*). This order was accompanied by a brief opinion which stated, without explanation, that "the public did not receive adequate notice from the railroads or the I.C.C. proceedings; * * *" (App. A, *infra*, p. 15). In addition, the court held that the residents and Governors of Kentucky, Tennessee, and Georgia should have been given notice of the Commission proceedings (*ibid.*).

The merits of the Commission's decision authorizing discontinuance were not reviewed and are not in issue here.[2]

THE QUESTION IS SUBSTANTIAL

The decision below, requiring that a railroad give notice of proposed discontinuance in areas served not by it, but by connecting roads, has important impact on the administration of Section 13a(1). The Commission has always read the notice requirements of this statute as applying only to the stations and states actually served by the road seeking discontinuance. Although settled administrative interpretation is a consideration entitled to great weight on review, see, *e.g.*, *Udall* v. *Tallman*, 380 U.S. 1, the court below failed even to take cognizance of it. Many prior cases, processed under this administrative interpretation, could now be open to challenge under the court's reading, there being no time limitation (other than the uncertain doctrine of laches) applicable to review of Commission orders.[3] In addition, numerous through passenger trains

[2] In the same order, the court also remanded to the Commission the matter of its separate authorization for discontinuance of another related L&N train, on the ground that that discontinuance could not properly be considered apart from the instant case. We have separately appealed from that remand (there being a separate case in the district court) and are filing a Jurisdictional Statement with respect thereto contemporaneously herewith (*United States, et al.* v. *Tennessee Public Service Commission, et al.*).

[3] It can be argued that the lower court's notice theory, if valid, exposes a jurisdictional defect in the prior cases. Under Section 13a(1), the Commission acquires power over the trains, thus supplanting state regulatory authorities, only "upon the filing of such notice".

are presently operated by two or more railroads on a cooperating basis.[4] The proper handling of any case involving such trains, when one of the participating roads seeks to discontinue only its segment, is rendered uncertain by the result below. Definitive interpretation of the statute's notice requirements by this Court would clarify the matter.

In our view the decision below is erroneous under the statute. The mechanism of Section 13a(1) is triggered by a "carrier or carriers * * * if their rights with respect to the discontinuance * * * [of an interstate train] are subject to * * *" state regulation. To seek Commission relief, the carrier must give notice "to the Governor of each State in which such train * * * is operated," and post notices at various points "served" by the train.

Here the C&EI operated only between Chicago and Evansville. To hold that C&EI must post notices in Kentucky, Tennessee, and Georgia is inconsistent with the statute's language and purpose. C&EI's "rights"

[4] These include operations between New York and Montreal via Penn Central and Delaware and Hudson; between Boston, New York and New Orleans via Penn Central and Southern; several daily trains between the Northeast and Florida points via Penn Central and Seaboard Coast Line; trains between Chicago and Florida via Illinois Central, Central of Georgia and Seaboard, and via Penn Central, L&N and Seaboard; trains between Louisville, New Orleans and Florida points via L&N and Seaboard; trains between Chicago and California points via Milwaukee, Union Pacific and in some instances, Southern Pacific; and the current version of the former "California Zephyr" operating between Chicago and San Francisco via Burlington, Denver & Rio Grande Western, and Southern Pacific.

were in no way "subject to" regulation by those states. No train was "operated" by C&EI in those states; no C&EI train "served" those states.[5]

The decision below might be arguably supported if Section 13a had been intended to assist states and localities seeking to preserve long-haul passenger service. But the statute was designed to aid railroads in circumventing unresponsive state regulatory commissions. *Southern R. Co.* v. *North Carolina*, 376 U.S. 93; *City of Chicago* v. *United States*, 396 U.S. 162. As expressed in the House Committee Report, "* * * it is proposed to add a new Section 13a to the act, whereby the railroads, at their option, may have the Interstate Commerce Commission, rather than State Commissions, pass upon the discontinuance or change in the operation of service of any train or ferry." House Report No. 1922, 85th Cong., 2d Sess., p. 12 (1958). Respect for the statutory scheme suggests that the Commission would replace state commissions only to the extent that they could have defeated a carrier's attempt to discontinue a train. Hence there should be no requirement as to notice in states which had no regulatory power over the carrier.

[5] For other purposes, a carrier is not normally regarded as "serving" points where it does not physically operate. See *Texas & Pacific Ry. Co.* v. *Gulf, C. & S.F. Ry. Co.*, 270 U.S. 266; *State of Georgia* v. *United States*, 156 F. Supp. 711 (N.D. Ga.), aff'd *per curiam*, 356 U.S. 273; *Chicago & Eastern Illinois R. Co.* v. *Illinois Central R. Co.*, 261 F. Supp. 289 (N.D. Ill.).

CONCLUSION

For the foregoing reasons, probable jurisdiction should be noted.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.
RICHARD W. MCLAREN,
Assistant Attorney General.
GREGORY B. HOVENDON,
ROBERT B. NICHOLSON,
Attorneys.

ROBERT W. GINNANE,
General Counsel,
JEROME NELSON,
Attorney,
Interstate Commerce Commission.

JULY 1970.

APPENDIX A

United States District Court for the Northern District of Illinois Eastern Division

No. 68 C 956

CITY OF CHICAGO, ET AL., PLAINTIFFS

v.

UNITED STATES OF AMERICA, ET AL., DEFENDANTS

No. 68 C 1666

TENNESSEE PUBLIC SERVICE COMMISSION, ET AL., PLAINTIFFS

v.

UNITED STATES OF AMERICA, ET AL., DEFENDANTS

ORDER

Following the filing of a copy of the mandate of the Supreme Court of the United States herein with the Clerk of the District Court, this three-judge court on February 5, 1970, entered an order wherein it (1) remanded both causes numbered 68 C 956 and 68 C 1666 to the Interstate Commerce Commission ("I.C.C.") for further proceedings and (2) held under advisement the motion made by plaintiffs and intervening plaintiffs to reinstate the temporary restraining order in case 68 C 1666 until the conclusion of the proceedings before the I.C.C.

Thereafter the various parties filed various motions and the three-judge court now has before it (1) motion of defendant Chicago & Eastern Illinois Rail-

road Company ("C&EI") for rehearing or amendment of said order of February 5, 1970; (2) motion of defendant Louisville and Nashville Railroad Company ("L&N") for rehearing and amendment of said order; (3) motion of defendants United States of America and I.C.C. for a new trial in both cases with memorandum in support thereof; (4) motion of plaintiffs and intervening plaintiffs for reconsideration and amendment of said February 5 order with memorandum in support thereof; (5) response of plaintiffs and intervening plaintiffs to the aforesaid motions of defendants; (6) response of defendant C&EI to plaintiffs' and intervening plaintiffs' motion; and (7) response of defendant L&N to plaintiffs' and intervening plaintiffs' motion.

The Court has considered all the foregoing motions, the responses and memoranda of the parties hereto and the opinion of the Supreme Court herein and is of the opinion that it should reconsider its order of February 5, 1970 and should modify and amend said order as hereinafter set forth in view of the additional facts and law presented to the Court.

It is, therefore, ORDERED, that the order of this Court entered herein on February 5, 1970 be and the same is hereby vacated.

The Court also has before it a motion by plaintiffs to consolidate cause No. 68 C 1666 with cause No. 68 C 956 on the ground that the two actions involve a common question of law and fact. Said motion was filed September 6, 1968, briefed and argued before the three-judge court on November 4, 1968. The Court reserved its ruling on same. The Supreme Court of the United States consolidated these cases for hearing and it is the opinion of this Court that the plaintiffs' motion to consolidate should now be granted.

It is, therefore, ORDERED that cause No. 68 C 956 and cause No. 68 C 1666 be and they are hereby consolidated.

The Court is of the opinion that it is equitable and in the best interest of the general public to maintain the status quo which existed on September 6, 1968 until further determination of these causes, as was originally done by entry of a restraining order in case No. 68 C 1666 by Judge Edwin A. Robson on that date, immediately after the filing of this suit, and which restraining order against discontinuance of the "Hummingbird" trains by the L&N was continued in full force and effect on September 12, 1968 by Judge Joseph Sam Perry. The temporary restraining order was heretofore dissolved by the Court in its order of January 8, 1969 granting the motion of L&N to dismiss.

Plaintiffs and intervening plaintiffs allege in their memorandum, filed February 16, 1970, that the L&N promised "restoration of the train service to the Circuit Justice" and that allegation has not been denied.

The Court finds that L&N, in its Memorandum in opposition to application to stay, represented to the Circuit Justice on January 10, 1969 the following:

> ". . . petitioners will have full right to pursue their statutory appeal to this Court, and if this Court should determine, upon full consideration, that the question of the operation of the trains should be examined by the Court below, the respondent railroad company will be fully answerable. In other words, the respondent railroad company will promptly resume the operation of the trains if required to do so by lawful order." (L&N Memorandum in Opposition to the Application to Stay, p. 8)

The L&N also submitted to this three-judge court at the September 12, 1968 hearing an affidavit stating:

> "Trains Nos. 6 and 7 can be put back in operation within a matter of less than twenty-four hours upon the dissolution of the court's order, since none of the equipment that is used in operating these trains will now be disposed of, and it will be kept in operating condition." (Affidavit of Jack Small, 9/10/68, pp. 1–2)

Defendants United States of America and I.C.C. have not interposed any objection to the motion of plaintiffs and intervening plaintiffs for reinstatement of the aforesaid restraining order against the L&N.

The Court finds that in a recent (December 3, 1969) decision of the I.C.C., 336 I.C.C. at 85, the Commission states:

> "In *Missouri Pac. R. Co.—Control—Chicago & E.I.R. Co.*, 327 I.C.C. 279 (1965), sustained *sub nom. Illinois Central Railroad Company* v. *United States*, 263 F. Supp. 421, affirmed per curiam 385 U.S. 457 (1967), C&EI's Chicago-Evansville line was awarded to L&N rather than Illinois Central *one of the important considerations in the Commission's determination being the anticipated maintenance and improvement of through passenger service between Chicago and the South via the C&EI and L&N route . . .*" (Emphasis supplied)

The Illinois Central Railroad continues to run trains to and from the South and so should the L&N continue to operate the "Hummingbird" trains pending final determination herein.

The Court finds that the I.C.C. is without jurisdiction to order interim relief beyond a four month period in connection with the "Hummingbird" trains pending the Commission's further proceedings herein. The Court itself does have jurisdiction to reinstate

operation of the "Hummingbird" trains pending the Commission's further proceedings herein.

It is, therefore, ORDERED that the restraining order entered herein on September 6, 1968, and continued September 12, 1968, be and the same is hereby reinstated to become effective within ten (10) days of the date of this order.

The three-judge court also is of the opinion that the I.C.C. should also reopen its investigations in the matter of the "Georgian" trains (Chicago-Evansville) involved in case No. 68 C 956, with due and proper notice to all parties in interest, and that the matters involved in cases 68 C 956 and 68 C 1666 should be consolidated by the I.C.C. in further proceedings.

The Court finds that in the proceedings before the I.C.C. relating to the discontinuance of the C&EI's "Georgian" trains the public did not receive adequate notice from the railroads or of the I.C.C. proceedings; and, further, although the residents of the States of Kentucky, Tennessee and Georgia were vitally interested in continued through passenger service by the railroads and the respective governors of those States were entitled to notice of the proceedings before the I.C.C., no notice was given them beforehand.

The Court is of the view that through passenger service from Chicago to and throughout the Southeastern part of the United States might or could be vital to the general public interest and that such service is so interwoven and entwined between the various railroads that only in a consolidated proceeding can a just and fair decision be reached.

It is, therefore, ORDERED that the orders of the I.C.C. in its Finance Docket Nos. 24725 and 25047, in so far as such orders discontinue the respective investigations, be and they hereby are vacated and that both

causes numbered 68 C 956 and 68 C 1666 be and they hereby are remanded to the I.C.C. and consolidated for further proceedings in accordance with the statutes so made and provided.

The Court enters the above orders in conformity with the opinion of the Supreme Court of the United States and for the purpose of carrying out the Supreme Court's mandate.

(S) WIN G. KNOCH,
Circuit Judge.

(S) J. SAM PERRY,
District Judge.

(S) EDWIN A. ROBSON,
District Judge.

Dated Chicago, Illinois, March 19, 1970.

APPENDIX B

In the United States District Court for the Northern District of Illinois Eastern Division

Civil Action No. 68 C 956

CITY OF CHICAGO, ET AL., PLAINTIFFS

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, DEFENDANTS

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES BY THE UNITED STATES OF AMERICA

I

Notice is hereby given that the United States of America, a defendant herein, appeals to the Supreme Court of the United States from the judgment entered March 19, 1970, setting aside orders of the Interstate Commerce Commission entered in Finance Docket No. 24725.

II

In accordance with the provisions of Rule 12 of the Rules of the Supreme Court of the United States, the Clerk of this Court is hereby requested to certify the entire record in this cause and provide for its

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transmission to the Clerk of the Supreme Court of the United States.

RICHARD W. MCLAREN,
Assistant Attorney General,

JOHN H. D. WIGGER,
Attorney,
Department of Justice,
Washington, D.C. 20530

THOMAS A. FORAN,
United States Attorney,
Chicago, Illinois 60604

Attorneys for the United States of America.

PROOF OF SERVICE

I, John H. D. Wigger, one of the attorneys for defendant United States of America, appellant herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 15th day of May, 1970, I served copies of the foregoing Notice of Appeal on the several parties to this action as follows:

1. On the plaintiffs herein, by mailing copies in duly addressed envelopes, to attorneys of record as follows:

With air mail postage prepaid to Wendell W. Wright, Esq. and Marion E. Wright, Esq., 106 North Vermilion Street, Danville, Illinois 61832; William E. Nelson, Esq., Dyer Building, Hoopeston, Illinois 60942; Robert P. Doolittle, Jr., Esq., 801 Busseron Street, Vincennes, Indiana 47591; Eugene W. Ward, Esq., Cordell Hull Building, Nashville, Tennessee 37219; Richard L. Curry, Esq. and Bernard Rane, Esq., 511 City Hall, Chicago, Illinois 60602; Neill S. Brown, Esq. and Robert E. Kendrick, Esq., 204 Metropolitan Courthouse Building, Nashville, Tennessee; George B. Tofaute, Esq., 17 Harding Avenue, Terre Haute, Indiana

47801; and Keith E. Roberts, Esq., 120 South LaSalle Street, Chicago, Illinois 60603.

2. On the intervening plaintiffs by mailing copies in duly addressed envelopes to their attorneys of record as follows:

With air mail postage prepaid to William F. Black, State Office Building, Montgomery, Alabama 36102; Anthony Haswell, Esq., 2517 N. Burling, Chicago, Illinois 60614; Weldon A. Cousins, Esq., 737 National Bank of Commerce, New Orleans, Louisiana 70112; Chester L. Rigsby, Esq., Kentucky Railroad Commission, State Office Building, Frankfort, Kentucky 40601; Robert S. Matthews, Esq., 1018 Southern Securities Building, Evansville, Indiana 47708; and Bennett E. Smith, Esq., Assistant Attorney General, State of Mississippi, State Office Building, Jackson, Mississippi 39201; Leon M. Despres, Esq., 77 W. Washington, Chicago, Illinois 60602; Henry C. Neel, Esq., Foran Credit Building, Henderson, Kentucky 42420; Sheldon A. Taft, Esq., 111 N. High Street, Columbus, Ohio 43215; J. Robert Coleman, Esq., 132 State Judicial Building, Atlanta, Georgia 30334; and Carl E. VanDorn, Esq., 807 State Office Building, Indianapolis, Indiana 46204.

With first-class mail postage prepaid to Gordon P. MacDougall, Esq., 705 Ring Building, Washington, D.C. 20036 and William B. Mahoney, Esq., 620 Tower Building, Washington, D.C. 20005.

3. On the intervening defendant by mailing copies in duly addressed envelopes to his attorneys of record as follows:

With air mail postage prepaid to Albert E. Jenner, Jr., Esq. and Keith F. Bode, Esq., 135 South LaSalle Street, Chicago, Illinois 60603; and Harry R. Begley, Esq., 72 West Adams Street, Chicago, Illinois 60603.

4. On defendant Interstate Commerce Commission by mailing copies with first-class postage prepaid to Robert W. Ginnane, General Counsel, and Jerome Nelson, Attorney, Interstate Commerce Commission, Washington, D.C. 20423.

JOHN H. D. WIGGER,
Attorney,
Department of Justice,
Washington, D.C. 20530.

[Filed, May 18, 1970]

In the United States District Court for the Northern District of Illinois Eastern Division

Civil Action No. 68 C 956

CITY OF CHICAGO, ET. AL., PLAINTIFFS

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, DEFENDANTS

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES BY THE INTERSTATE COMMERCE COMMISSION

I

Notice is hereby given that the Interstate Commerce Commission, a defendant herein, appeals to the Supreme Court of the United States from the judgment entered March 19, 1970, setting aside orders of the Interstate Commerce Commission entered in Finance Docket No. 24725.

II

In accordance with the provisions of Rule 12 of the Rules of the Supreme Court of the United States, the Clerk of this Court is hereby requested to certify the entire record in this cause and provide for its transmission to the Clerk of the Supreme Court of the United States.

ROBERT W. GINNANE,
General Counsel,
JEROME NELSON,
Attorney,
Interstate Commerce Commission,
Washington, D.C. 20423.

PROOF OF SERVICE

I, Jerome Nelson, one of the attorneys for defendant Interstate Commerce Commission, appellant herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 12th day of May, 1970, I served copies of the foregoing Notice of Appeal on the several parties to this action as follows:

1. On the plaintiffs herein, by mailing copies in duly addressed envelopes, to attorneys of record as follows:

With air mail postage prepaid to Wendall W. Wright, Esq. and Marion E. Wright, Esq., 106 North Vermilion Street, Danville, Illinois 61832; William E. Nelson, Esq., Dyer Building, Hoopeston, Illinois 60942; Robert P. Doolittle, Jr., Esq., 801 Busseron Street, Vincennes, Indiana 47591; Eugene W. Ward, Esq., Cordell Hull Building, Nashville, Tennessee 37219; Richard L. Curry, Esq. and Bernard Rane, Esq., 511 City Hall, Chicago, Illinois 60602; Neill S. Brown, Esq. and Robert E. Kendrick, Esq., 204 Metropolitan Courthouse Building, Nashville, Tennessee; George B. Tofaute, Esq., 17 Harding Avenue, Terre Haute, Indiana 47801; and Keith E. Roberts, Esq., 120 South LaSalle Street, Chicago, Illinois 60603.

2. On the intervening plaintiffs by mailing copies in duly addressed envelopes to their attorneys of record as follows:

With air mail postage prepaid to William F. Black, State Office Building, Montgomery, Alabama 36102; Anthony Haswell, Esq., 2517 N. Burling, Chicago, Illinois 60614; Weldon A. Cousins, Esq., 737 National Bank of Commerce, New Orleans, Louisiana 70112; Chester L. Rigsby, Esq., Kentucky Railroad Commission, State Office Building, Frankfort, Kentucky 40601; Robert S. Matthews, Esq., 1018 South-

ern Securities Building, Evansville, Indiana 47708; and Bennett E. Smith, Esq., Assistant Attorney General, State of Mississippi, State Office Building, Jackson, Mississippi 39201; Leon M. Despres, Esq., 77 W. Washington, Chicago, Illinois 60602; Henry C. Neel, Esq., Foran Credit Building, Henderson, Kentucky 42420; Sheldon A. Taft, Esq., 111 N. High Street, Columbus, Ohio 43215; J. Robert Coleman, Esq., 132 State Judicial Building, Atlanta, Georgia 30334; and Carl E. VanDorn, Esq., 807 State Office Building, Indianapolis, Indiana 46204.

With first class mail postage prepaid to Gordon P. MacDougall, Esq., 705 Ring Building, Washington, D.C. 20036 and William B. Mahoney, Esq., 620 Tower Building, Washington, D.C. 20005.

3. On the intervening defendant by mailing copies in duly addressed envelopes to his attorneys of record as follows:

With air mail postage prepaid to Albert E. Jenner, Jr., Esq. and Keith F. Bode, Esq., 135 South LaSalle Street, Chicago, Illinois 60603; and Harry R. Begley, Esq., 72 West Adams Street, Chicago, Illinois 60603.

4. On defendant United States of America by mailing copies with first-class postage prepaid to the Honorable Erwin N. Griswold, Solicitor General of the United States, Department of Justice, Washington, D.C. 20530; to the Honorable Thomas A. Foran, United States Attorney, Chicago, Illinois 60604; to the Honorable Richard W. McLaren, Assistant Attorney General of the United States and the Honorable John H. D. Wigger, Attorney, Department of Justice, Washington, D.C. 20530.

JEROME NELSON,
Attorney,
Interstate Commerce Commission.

[Filed, May 14, 1970]

APPENDIX C

Served January 31, 1968

F-9449

INTERSTATE COMMERCE COMMISSION

FINANCE DOCKET NO. 24725

CHICAGO & EASTERN ILLINOIS RAILROAD CO.—DISCONTINUANCE OF TRAINS NOS. 93 AND 54 BETWEEN CHICAGO, ILL., AND EVANSVILLE, IND.

Decided January 25, 1968.

Upon investigation, found that operation by the Chicago & Eastern Illinois Railroad Company of passenger trains Nos. 93 and 54 between Chicago, Ill., and Evansville, Ind., is not required by public convenience and necessity, and that the continued operation thereof will unduly burden interstate commerce. Investigation discontinued.

James H. Durkin and *Edwin Richardson* for rail carrier.

J. Fred Parker for Georgia Public Service Commission, protestant.

William H. Wilson for Public Service Commission of Indiana, protestant.

Mary Louise Wolford for the public of the State of Indiana, protestant.

Edward G. Finnegan, Leon J. Heidgen and *James A. Parker* for Illinois Commerce Commission, protestant.

Harold Cowen and *Bernard Rane* for city of Chicago, Ill., protestant.

Robert S. Matthews and *Ronald Warrum* for city of Evansville, Ind., protestant.

Keith E. Roberts for village of Milford, Ill., and city of Watseka, protestants.

William E. Nelson for city of Hoopeston, Ill., protestant.

Marion E. Wright for city of Danville, Ill., protestant.

Robert F. Doolittle, Jr. for city of Vincennes, Ind., protestant.

Frederick T. Bauer for city of Terre Haute, Ind., protestant.

Raymond J. Kearns for Sisters of Providence, St. Mary of the Woods, Ind., protestant.

William P. Byroad, Gordon E. Cox, B. L. Dresbach, Thomas J. Duggan, George B. Lee, J. Thomas McNeal, William E. Nelson,

Earl G. Quinn, Keith E. Roberts, J. H. Smith, and *George P. Sheahan* for various railway labor organizations.

REPORT OF THE COMMISSION

DIVISION 3, COMMISSIONERS TUGGLE, BUSH, AND STAFFORD

TUGGLE, *Commissioner:*

Pursuant to the provisions of section 13a(1) of the Interstate Commerce Act as amended, the Chicago & Eastern Illinois Railroad Company (C&EI), a common carrier by railroad subject to the provisions of part I of the act, on August 31, 1967, filed notices and supporting statements in which it proposed to discontinue, effective October 1, 1967, service by its interstate passenger trains Nos. 93 and 54 between Chicago, Ill., and Evansville, Ind., a distance of 287 miles. Copies of the notices were duly served and posted in the manner required by section 13a(1) and our rules and regulations thereunder.

By petition filed concurrently in Finance Docket No. 24726, C&EI seeks authority under section 13a(2) to discontinue service by its intrastate passenger trains Nos. 3 and 4 between Chicago and Danville, Ill. That proceeding is the subject of a report and recommended order[1] of the hearing examiner served separately. C&EI's application filed with the Illinois Commerce Commission for authority to discontinue trains Nos. 3 and 4 was denied by that body on September 20, 1967. Appropriate notice of the petition filed here in Finance Docket No. 24726 was served on the Governor of the State of Illinois.

Protests to C&EI's proposal in the titled proceeding were filed by communities along the line and State, civic, business, and railway labor interests, as well as users of the trains. By order of September 18, 1967, we instituted an investigation and required continued operation of trains Nos. 93 and 54 pending a hearing and decision (up to the statutory maximum of 4 months). Because of the statutory limitation on the time available for investigation and decision, our order provided for omission in the titled proceeding of a report and recommended order by the examiner as part of the decisional process and for certification of the record to us for initial decision.

[1]By petition filed December 14, 1967, C&EI sought omission of the examiner's report and recommended order in Finance Docket No. 24726 and consolidation of that matter with this proceeding. Replies thereto were filed by certain protestants, and by order entered January 8, 1968 the petition was denied.

Public hearings were held in Chicago, Momence, Watseka, Hoopeston and Danville, Ill., and Evansville, Vincennes, and Terre Haute, Ind., on a consolidated record with the section 13a(2) proceeding in Finance Docket No. 24726. Briefs were filed by C&EI, the Illinois Commerce Commission, and jointly by the village of Milford, the cities of Watseka, Danville and Hoopeston, Ill., and the Brotherhood of Railroad Trainmen.

At the hearing protestants moved for dismissal of the proceedings on several grounds, principally that since Missouri Pacific Railroad Company (MoPac) controls C&EI, use of financial data relating only to C&EI and excluding MoPac is grossly misleading and contrary to the provisions of the act. Other relief sought included suspension or termination of the proceedings and oral argument on the motion. C&EI replied in opposition, and the motion was taken under advisement. The protestants pursue the argument on brief.

The motion is denied. Oral argument is not warranted. By contending MoPac is a necessary party to these proceedings, protestants ignore the plain language of section 13a of the act, which confers upon this Commission jurisdiction over proposed passenger train discontinuances by "a carrier or carriers subject to this chapter." Clearly, C&EI falls within the term "a carrier" subject to part I of the act. Whether or not the statutory standards for ordering a continuance of service are met is a matter which, in this case, does not depend (as will later be made clear) upon the corporate relationship of MoPac and C&EI. Piercing the corporate veil may be warranted in some situations, as for example, where false and misleading representations are made or where some unlawfulness may be involved, and perhaps in other circumstances, but here no such question is raised and no substantial reason is advanced to pursue that course. The record indicates that C&EI is the proper party in interest and that it has fully cooperated in presenting the data required for our action.

Trains Nos. 93 and 54 operate on the following schedules:

Train No. 93 daily	Miles		Stations		Train No. 54 daily
P.M.					A.M.
3:45	0.0	Lv.	Chicago, Ill.	Ar.	10:35
3:59	6.6		Chicago (63rd St.)		10:21
A4:30	28.8		Steger	E	9:44
	77.5		Watseka	G	8:49
6:10	123.2		Danville		7:55
7:15	177.5		Terre Haute, Ind.		6:40
B7:45	203.7		Sullivan	G	6:11
8:18	234.7		Vincennes		5:40
D8:50	259.0		Princeton		5:05
9:55	287.2	Ar.	Evansville	Lv.	4:30

A—Stops to receive passengers.
B—Stops to discharge revenue passengers from Chicago and Steger.
D—Stops to discharge or receive revenue passengers.
E—Stops to discharge passengers.
G—Stops to receive revenue passengers for Chicago.

Their operation is in conjunction with trains of the Louisville & Nashville Railroad (L&N) similarly designated, which operate between Evansville and Atlanta, Ga., and Montgomery, Ala. The interchange is at Evansville. The L&N splits its southbound No. 93 at Nashville, Tenn., with one section terminating at Atlanta and the other at Montgomery. L&N originates one section of its northbound train No. 54 at Atlanta and the other at Montgomery, and consolidates the two at Nashville.

The trains, designated "The Georgia—Hummingbird," carry passengers and baggage. They are powered with three diesel locomotives, and have a consist of 10 regularly assigned cars daily with 11 cars on Friday, Saturday and Sunday. Train No. 93 leaves Chicago with a baggage-mail car, a dormitory, diner, lounge, sleeper and two coaches destined to Atlanta daily; a coach destined to Evansville on Friday, Saturday and Sunday; two coaches destined to Montgomery daily; and a sleeper destined to Mobile daily. Train No. 54 has a baggage-mail car, a dormitory, diner, lounge, sleeper and two coaches originating at Atlanta daily; a coach originating at Evansville on Friday, Saturday and Sunday; two coaches originating at Montgomery daily; and a sleeper originating at Mobile daily; all cars having destination to Chicago. The passenger-carrying equipment is air-conditioned.

Due to a restructuring of mail service by the U. S. Post Office Department, the mail cars were discontinued as of June 10, 1967, except for one storage-mail car from Chicago to Birmingham, Ala., and in October 1967, the Post Office Department removed that car. The mail handled in the baggage-mail car is minimal.

Train No. 93 still carries express traffic for the account of Railway Express Agency, Inc., destined to Chattanooga. These trains do not handle the express to or from C&EI points south of Chicago.

Alternate passenger transportation service to and from the communities served by C&EI between Chicago and Evansville, and south thereof served by L&N is available by bus and by air at most points. There are four flights daily southbound and three northbound between Chicago and Danville; two flights daily southbound and three northbound between Chicago and Terre Haute; and four flights daily southbound and five northbound between Chicago and Evansville. Numerous flights are scheduled between Chicago, on the one hand, and, on the other, Atlanta, Chattanooga, Birmingham, Nashville, Montgomery, and Mobile, and between Evansville and Atlanta. Watseka and Hoopeston, Ill., Sullivan, Vincennes and Princeton, Ind., have no air service.

A major bus line operates three southbound and four northbound buses daily between Chicago and Evansville, with stops at all intermediate points served by the subject trains. Rail transportation is available, though limited, (a) by C&EI trains Nos. 3 and 4 between Chicago and Danville (but those are the trains involved in Finance Docket No. 24726, the discontinuance proceeding referred to above) and (b) by Illinois Central Railroad (IC) between Chicago and Carbondale, Ill., and points south thereof (four trains daily in each direction). Highway distances between communities served by C&EI and those served by IC in Illinois vary from 12 to 35 miles. Bus fares are lower than rail fares between Chicago and all points served by the subject trains, except Sullivan, Ind. Air fares are higher than rail or bus.

C&EI maintains that it has lost patronage to the private passenger automobile (as a mode of intercity transportation), and, as evidence thereof, introduced statistics showing the increase in the number of registered automobiles in the counties of Illinois and Indiana traversed by the subject trains. Considering the five Illinois counties (Cook, Will, Kankakee, Iroquois, and Vermillion) and the six Indiana counties (Park, Vigo, Sullivan, Knox, Gibson, and Vanderburg) it was shown that in 1960 the Illinois counties had 1,653,520 registrations while the Indiana counties had 132,253, and that by 1966, there was an increase of about 20 percent—to 1,994,751 in the Illinois counties and 158,186 the Indiana counties.

For the benefit of automobile users, Illinois Highway 1 between Chicago and Danville and U. S. Highway 41 between Danville and Evansville are adjacent to and parallel the line of C&EI. Also U. S. Highway 41 continues northward in Indiana east of Illinois Highway 1 to Chicago. Both are first class highways and U. S. Highway 41 has substantial segments with four lanes. A number of witnesses testified to the effect that driving on the highways is dangerous. South of Chicago and its suburbs the roads traverse sparsely populated areas, are generally straight and the terrain is flat.

The population[2] at the points served by the subject trains was shown as follows: Chicago 3,550,404, Chicago Heights 41,000, Watseka 5,219, Hoopeston 6,606, Danville 41,856, Terre Haute 72,500, Sullivan 4,979, Vincennes 18,046, Princeton 7,906, and Evansville 141,543.

A number of those points have commercial or service areas extending beyond their corporate limits and the population reflected by such areas is larger than for the point involved.

During the periods 1965, 1966 and first 6 months of 1967, train No. 93 carried 84,259, 82,213 and 31,913 passengers, respectively, of which 53,344, 56,230, and 20,952 were delivered to L&N at Evansville. The daily average numbers of revenue passengers transported by that train for the same periods were 230, 225, and 176, respectively, of which 84, 71, and 60, respectively, were local passengers (traveling between C&EI stations). During the same periods, train No. 54 carried 76,854, 75,271, and 28,186 revenue passengers, respectively, of which 57,983, 60,063 and 21,682, were received from L&N at Evansville. The daily average numbers of revenue passengers transported by that train for the same periods were 210, 205, and 153, of which 51, 40, and 33, respectively, were local. The foregoing data were determined from analysis of records of tickets collected by conductors, cash fares received, and tickets honored but not collected, apportioned to the subject trains according to the number of miles traveled thereon.

The supporting studies also show the numbers of passengers boarding and deboarding at each station. Considering the last 6 months of 1967 as representing the present level of patronage, of the 176 passengers on train No. 93, an average of 156 boarded at Chicago, 12 at Steger, 5 at Danville, 2 at Terre Haute and 1 at

[2]Based on the census taken in 1960. Since that time, some of the areas served have had population increases.

Vincennes, and 17 left the train at Danville, 20 at Terre Haute, 1 at Sullivan, 7 at Vincennes, 2 at Princeton, 13 at Evansville, and 116 continued on the L&N. Of the 153 passengers on train No. 54 an average of 120 were through passengers from the L&N, 12 boarded at Evansville, 2 at Princeton, 6 at Vincennes, 1 at Sullivan, 11 at Terre Haute, 4 at Danville, and 1 at Watseka, and 3 left the train at Terre Haute, 3 at Danville, 8 at Steger and 139 at Chicago. Thus, the record shows that the C&EI points south of Chicago have had few passengers boarding or leaving the trains.

C&EI's balance sheet statement as of July 31, 1967, shows assets aggregating $119,182,901, including current assets of $10,220,039, special funds $484,841, investments $10,941,671, total properties less depreciation and amortization $96,182,478, and other assets and deferred charges $1,353,872. Liabilities were: current liabilities of $9,631,117, long-term debt of $53,494,944 (including $3,103,470 due within 1 year), reserves $659,983, other liabilities and deferred credits $619,844, capital stock $29,837,372, capital surplus $112,522, and retained income $24,827,119. Its income statements for 1965, 1966 and first 7 months of 1967, show railway operating revenues of $40,578,936, $41,780,952, and $23,604,275; net railway operating income of $3,486,070, $4,091,786, and a deficit of $1,005,900; and net income after fixed charges and other deductions of $1,736,086, $2,853,372, and a net deficit of $1,757,265, respectively.

C&EI has incurred annual net railway operating deficits in its passenger service in amounts in excess of $1 million for the years 1962 through 1966, inclusive. More than 20 percent of freight net income has been required to subsidize these rail passenger deficits in each of the years 1957 through 1966, except 1959 when the percent of freight net income so required exceeded 12 percent. C&EI estimates that the national award of September 16, 1967 to the shopcraft employees, retroactive to January 1, 1967, will increase its labor costs by $210,000 in 1967 and by $321,000 in 1968. Further, a recent agreement with the Brotherhood of Locomotive Engineers will result in payment of $100,000 to C&EI locomotive engineers in backpay. None of those additional expenses were included in determining the cost of operating the subject trains during the first 6 months of 1967, or in projections made.

C&EI shows data respecting the financial results of the operation of the trains for the years 1965, 1966, and the first 6 months

of 1967. In 1965, train No. 93 had revenues (passenger, diner, express and mail) of $1,096,607 and out-of-pocket expenses of $1,001,950 for a net income of $94,657. For the same year, train No. 54 had similar revenues of $811,156, and out-of-pocket expenses of $862,270 for a net out-of-pocket loss of $51,114. In 1966, the corresponding figures for train No. 93 were $1,083,494 revenues, $1,125,287 costs, and $41,793 deficit; for train No. 54 they were $816,863 revenues, $1,022,127 costs, and $205,264 deficit; the combined net loss for both trains was $247,037. In the first 6 months of 1967, the corresponding figures for train No. 93 were $420,167 revenues, $522,421 costs, and $102,254 deficit, and for train No. 54, $311,281 revenues, $477,387 costs, and $166,106 deficit; the combined net out-of-pocket loss was $268,360. Details of the revenues and expenses for those periods indicated as computed by the carrier are shown in the attached appendix A.

As indicated, actual revenues from these trains, including car-hire revenue are reflected in the data presented. The following actual expenses were also employed: Train engineman expense, traincrew expense, sleeping car expense, insurance, expenses incurred in clearing wrecks, baggage loss and damage claims, injuries to persons and dining car and buffet car service. Other expenses and savings data were computed using methods approved by the Commission in prior proceedings. Increases in expenses for 1966 over those of 1965 occurred in four accounts (a) passenger train cars—repairs, (b) equipment depreciation—passenger cars, (c) train supplies and expenses, and (d) joint facility accounts. These were the subject of detailed inquiry. On (a) an accident to train No. 93 at Hoopeston in April 1966, were required extensive repairs to passenger cars ($59,506). Expenses charged to that account in 1965 were abnormally low. On (b) C&EI did not, until 1967, retire its head-end equipment used on other trains in 1965 and 1966, having made such equipment available to the U. S. Post Office Department for use in trains Nos. 93 and 54. Retirements of head-end equipment in 1967, when mail was removed from all C&EI passenger trains amounted to $365,549, but this increase in expense was not reflected in the financial results discussed above. In projecting revenues and expenses involved in operating the subject trains without the mail revenue equipment, depreciation on only those cars which would be required to operate the subject trains without any head-end business was considered. On (c) the total passenger portion of the account actually decreased in 1966, but spreading the expense over fewer trains than in 1965, resulted

in an increased allocation to the remaining trains. On (d) the increase in joint facility expenses in 1966 was due to the discontinuance of passenger trains by other railroads using such facilities, which added proportionally to the expense burden on the remaining trains.

Trains Nos. 93 and 54 use joint facilities at Chicago with four other railroads, and with one other at Terre Haute, Vincennes, and Evansville. During the first 6 months of 1967, no C&EI passenger trains, other than the subject trains used the Terre Haute, Vincennes and Evansville facilities, and as a result, all of the amounts paid for use of those facilities ($25,356, $18,136, and $104,328, respectively) are savable. Joint facility costs were computed in accordance with those methods and standards approved in *Chicago, R. I. & P. Co., Discontinuance of Trains*, 328 I.C.C. 278.

The foregoing data reflect revenues received by C&EI for transportation of mail. Projected annual revenues and out-of-pocket expenses, exclusive of mail traffic, using 1966 revenue data, show that C&EI would incur an annual loss of $242,850 in the operation of train No. 93 and $191,780 in the operation of train No. 54. In projecting equipment depreciation and other expense items only the equipment that actually would be used was considered. The projected annual revenues and out-of-pocket expenses, exclusive of mail traffic, were shown as follows:

	Train No. 93	Train No. 54
Revenues:		
102 Coach[1]	$532,953	$468,549
102 First class[1]	87,680	113,593
103-108 Baggage and other[1]	2,270	1,153
107 Express[2]	587	34,909
131 Dining and buffet[1]	47,844	47,844
Total revenue	671,334	666,048
505-538 Car-hire, net[3]	4,785	4,785
Revenue and income	676,119	670,833
Total expense	918,969	862,563
Profit or loss	(242,850)	(191,730)
Expenses:		
Maintenance of equipment—		
311 Repairs, diesel locomotives[4]	53,406	53,390
317 Passenger train car repairs[5]	141,817	141,817
331 Equipment depreciation—locomotive[6]	8,760	8,760
331 Equipment depreciation—cars[7]	30,103	30,103
335 Employee health and welfare benefits[8]	2,502	2,502
Traffic:		
351-380 Passenger traffic[4]	21,996	16,036

	Train No. 93	Train No. 54
Transportation:		
373 Station employees[4]	$15,650	$14,568
376 Station supplies and expense[4]	3,062	2,768
378 Yard conductor and brakeman[9]	5,532	5,532
392 Train enginemen[10]	50,193	52,987
394 Train fuel[11]	30,400	30,400
397 Water for train locomotion[11]	1,781	1,781
398 Lubrication for train locomotion[11]	3,709	3,709
399 Other supplies for train locomotion[11]	168	168
400 Enginehouse expense—train[11]	8,108	8,108
401 Trainmen[10]	67,844	67,134
402 Train supplies and expenses[12]	88,308	88,308
403 Operating sleeping cars[4]	49,060	37,392
409 Employee health and welfare benefits[8]	5,163	5,222
Insurance[13]	16,405	16,405
419 Loss and damage—baggage[14]	550	480
420 Injuries to persons[14]	41,044	2,754
441 Dining and buffet service [4]	71,188	71,188
General:		
452 Clerks, accounting[4]	9,142	8,488
456 Employee health and welfare benefits[4]	360	324
All joint facility accounts[15]	170,720	170,720
532 Railway tax accruals[16]	21,958	21,542
Total expenses	918,969	862,563

[1]1966 actual. The number preceding each item is the account number in the Commission's Uniform System of Accounts.

[2]Projected based on current traffic.

[3]Projected based on car assignments.

[4]Projected based on first 6 months 1967 expenses.

[5]Projected based on estimated car miles @ first 6 months 1967 cost per car mile.

[6]Based on two unit assignment.

[7]Based on cars required.

[8]Based on current G.M.A. rates applied to labor only.

[9]Based on current assignment.

[10]Based on 1966 payments plus wage increases.

[11]Based on 2 unit assignment @ first month 1967 cost per unit miles.

[12]Based on estimated car mile @ first 6 months 1967 cost per mile plus crews' lodging and meals at current costs.

[13]Based on current premiums.

[14]Based on 2.5 year average.

[15]Based on estimated car assignments.

[16]Based on current rates applied to labor only.

It is thus apparent that C&EI has incurred substantial losses in the operation of the trains Nos. 93 and 54 and that the losses will substantially increase as a result of the Post Office Department's removal of mail from those trains and the consequent discontinuance of passenger trains of other railroads using the Chicago terminal facility, although the latter factor was not considered in making the above projections.

Eight communities on the line served by the subject trains intervened in opposition: Chicago, Watseka, Milford, Hoopeston, and Danville, Ill., and Terre Haute, Vincennes, and Evansville, Ind. The trains do not serve Milford. Although some Illinois residents who ride C&EI train No. 4 northbound return on train No. 93 southbound, the witnesses testifying at communities in Illinois were primarily interested in the continued operation of trains Nos. 3 and 4. The latter are the subject of the section 13a(2) proceeding in Finance Docket No. 24726 and, under the provisions of that section, are being dealt with in the report of the hearing examiner. Indiana interveners and witnesses testifying at Indiana points were concerned with continued operation of the subject trains.

Of the 144 public witnesses who testified on the consolidated record, 90 directed their testimony in whole or in part to the subject trains. Not all use the services of the trains. Thirty-one testified on behalf of State, county, city government or municipal organizations, civic or trade organizations, and colleges or universities, and one presented the views of a Congressman. A number were concerned with rail passenger service generally, though they themselves did not use the services provided by the subject trains. With few exceptions the public witnesses desire the trains continued in what would be a standby service for use as convenience in bad weather, at holiday periods and for shopping trips. No public witnesses testified at Chicago.

At Watseka, the mayor and representatives of the chamber of commerce and the County Farm Bureau indicated that, although they do not use the subject trains, there is need for rail passenger service in inducing industry to locate in the area. A surgeon testified to using the trains 20-24 times a year to and from Chicago where, he indicates, an increasing number of his patients require medical service. He owns an automobile, but does not use it on long trips.

At Hoopeston, the mayor and the president of the chamber of commerce expressed concern over rail passenger service. Testimony was given by a department store buyer and a beautician. Two personnel managers of large corporations indicated that prospective employees inquire about transportation facilities to and from Chicago. One could express no opinion as to whether discontinuance of the subject trains would have a detrimental effect on recruiting employees in Hoopeston; the other uses other trains of C&EI and was more concerned with their retention. The president of the Hoopeston Industrial Corporation points out

that every prospective industry mentions transportation. A representative of a corn festival held annually each September in Hoopeston urges continuation of the service, but of the 100,000 persons attending the last occasion, he knew of only four who came by rail. The foregoing witnesses themselves rarely patronize the subject trains. Another witness rides train No. 93 during unusually heavy snowstorms when other means of travel are not available.

At Danville, municipal, commercial and other organizational spokesmen were concerned with rail passenger service generally and specifically C&EI trains other than those here involved. Several other witnesses proved to be only occasional patrons of trains Nos. 93 and 54—a bookkeeper, a number of railroad employees (who rated their on-time performance as poor), a housewife (who finds them crowded and often late), another housewife whose children sometimes use the trains going to and from colleges (particularly in bad weather), and an architect who expressed the view that the discontinuance would hamper Danville's development. Another witness who uses C&EI trains about once a month, occasionally drives his automobile to Chicago, but would not go by bus because he considers the bus routes circuitous and the service time consuming. Support for continued operation was voiced by a junior chamber of commerce spokesman for 110 members who testified that he used the trains only once, but that the majority of the membership use all C&EI trains; and by the chamber of commerce (representing 116 manufacturing firms) as part of its program to promote improvement in transportation. Several manufacturing organizations indicated that some of their employees occasionally use the trains. Spokesmen for three civic organizations use the trains several times a year, particularly during inclement weather, but also have used alternate transportation, including private automobile. A number of the witnesses testified that the northbound train is frequently late and dirty, that this was reported to the railroad and that there was little effective response.

At Evansville, the mayor and a State senator opined that discontinuance of the trains would be detrimental to the growth of industry and commerce in the community. The mayor uses air service on many occasions and uses rail service about once every 6 months. The senator does not have occasion to use C&EI's service. The chamber of commerce spokesman urged that the discontinuance be deferred until L&N acquires the eastern side of

C&EI's line, although the transportation division which he represents voted six to three against opposing discontinuance. An aide to a member of Congress from Indiana presented the Congressman's views that rail passenger transportation service is vital to the economic growth of the community, and that all modes of transportation must be kept available. Other witnesses testified to a preference for rail over alternate modes for the occasional trips they take, though some of them found the rail cars crowded, dirty and sometimes unheated. Among them was the representative of a religious community having 30 nuns stationed at Evansville. She indicated that her order's recent transportation requirements were accomplished through use of charter bus service, and that the sisters have sufficient automobiles at their disposal.

At Vincennes, the mayor opposed the discontinuance but, in so doing, was not supported by the city council. The chamber of commerce mailed 475 questionnaires to area residents regarding the proposed discontinuance; 82 were returned showing a 3 to 1 preference for keeping the trains on. A survey at Vincennes University revealed that 22 of the 2,243 students use the trains. Members of the faculty use them twice a year. Seven students said they hope to use them more frequently, particularly during bad weather. A number of other witnesses—all of them only occasional users—complained about the condition of the trains and the station at Vincennes, about a poor on-time record, crowded and dirty equipment. All of the above witnesses urge continuation of the service with improvement of quality.

At Terre Haute, the mayor pressed the view that passenger train service is needed in the development of industry and commerce. On his six trips to Chicago in the past year he used train service once when his air flight was grounded on account of bad weather. The chamber of commerce cited statistics showing growth in population, commerce, enrollment in the universities and retail sales as yardsticks of a demand for improved service. Aware that loss of mail revenues has precipitated discontinuance of passenger rail service, it argued that the railroad should consider providing complete service, freight and passenger, and should look to the passenger market as any other business man looks at a new market. Further, that a successful company expects to absorb departmental losses within its gross earnings in order to provide a complete service. Professors and students of a local university, opposing the discontinuance, testified to their use of the trains variously from regular weekend use to once or

twice a year during inclement weather. Student ownership of automobiles by upper classmen is permitted and some of the students use the trains only when they cannot obtain automobile transportation. Student use of the trains is primarily on holidays and at the beginning and end of summer vacation. While enrollment at the local university has more than doubled in the past 6 or 7 years, use of the trains at Terre Haute has continued to decline.

A religious order with national headquarters at nearby St. Mary of the Woods has 350 members who ride the trains to Chicago twice annually for connections east and west thereof. The order has a number of automobiles at its disposal and has used them and bus service for Chicago trips. In advertising for its college the order would like to be in a position to advise prospective students that easy access is available via rail among other modes. It has had some difficulty with on-time performance of the trains, particularly in making connections. The college has about 400 students, a number of whom are from the Chicago area.

Some evidence was presented to show the carrier's car-cleaning program and the problems involved. Sometimes delay in arrival at Chicago requires quick turnaround, and cleaning of the cars leaves much to be desired. The record indicates that C&EI has made some effort to overcome the problem but must deal with C&WI which maintains the Chicago terminal facility.

Discussion and conclusions.—Numerous factors are considered in determining whether to order the continuance of service under section 13a(1) of the act. Among them are public use of the service, population of the area, effect of a train discontinuance upon the communities served, available alternate transportation, financial results of the operation, prospects for the future, and the carrier's financial condition. The weight to be given each factor depends on the circumstances in a particular case. No one factor is necessarily controlling. The intent of Congress in enacting section 13a was to enable carriers to discontinue train services that no longer pay their way, and for which there is no longer sufficient public need to justify the financial loss involved. See *Southern Ry. Co.* v. *North Carolina*, 376 U.S. 93.

At one time the passenger train was the pride of the transportation system. This was especially so in the United States where there was vast wilderness to be tamed, rich deposits of natural resources to be tapped, and large, widely-separated cities to be connected. The railroad and its passenger trains provided the

strands for tying the far-flung areas together, and the channels for rapid, efficient communication and transport. Time and inventive genius created more efficient means for performing a number of the functions for which we formerly relied on the rails. Electronics provide instant communication, and airplaines cut transport time tremendously for people, mail and express. The automobile and the supper highway—for which the American people have a special fascination—provide particular convenience which other modes cannot duplicate.

The evidence now before us shows that the subject trains no longer are used by express shippers (except for some movements between Chicago and Chattanooga), or by the Post Office Department for mail (once a highly remunerative source of traffic and a primary source of sustenance for passenger trains). Passenger traffic has been dwindling. In the meantime, costs continue upward inexorably. The general rise in costs throughout the economy are reflected in the railroad's expenses for employees, equipment, fuel, supplies, facilities and services. With the loss of mail revenues making a dramatic change in the financial results of the operation, C&EI would have to absorb an out-of-pocket deficit well over $400,000 per year in order to continue trains Nos. 93 and 54. It is likely that the deficit would go beyond a half million dollars.

Financially, this carrier is at best marginal. It has a history of deficit operation and is beset with numerous problems flowing therefrom regarding rehabilitation of its line and recovery of traffic. See *Missouri Pac. R. Co.–Control–Chicago & E. I. R. Co.*, 327 I.C.C. 279 (1965). The slender profit shown on this record for 1965 and 1966 occurred at the height of a record breaking period of national prosperity. The relatively slight slowdown in the national economy during 1967 had an immediate and telling effect on C&EI's operation, creating a net deficit of nearly $2 million in the first 7 months of the year. C&EI is an important link in the national rail system and from the point of service in its own area and as an integral part of the national system, its viability is a thing much to be desired. Continuance of the subject trains would militate against that objective. There is no reasonable prospect for relief from the financial burdens imposed by those trains. To the contrary, all indications are that the burdens would mount. And this, in turn, would soon intensify the railroad's malaise, all to the detriment of the public.

The people who have been using the trains for travel have done so largely on an occassional or standby basis. Their primary

means of conveyance are the automobile and other nonrail modes. The testimony of the governmental leaders, business representatives, students and housewives is clear proof of that. The witnesses themselves appear to prefer air and automobile travel. Many gave opinions about a need for rail passenger service in the interest of community and commercial growth, but few hard, realistic facts were advanced by them in support. The passenger-use statistics stand as stark proof that, regardless of what is felt and said, the people along the C&EI's Evansville-Chicago line are not using the trains. Their patronage is minimal.

For those who must depend upon public transportation, bus service is far more plentiful than the train service—at all points on the line. Use of the buses will require an adjustment, but whatever inconvenience might be experienced does not outweigh, on the scale of the public interest, the tremendous burden continued operation of the trains would involve. We conclude that discontinuance by C&EI of trains Nos. 93 and 54 is consistent with the purpose of section 13a(1) of the act, and the objectives of the national transportation policy.

Certain railway employees seek imposition of the *Burlington* or similar conditions in the event the discontinuance is authorized. Similar requests have been considered in prior proceedings of this nature, and the Commission has uniformly held that we do not possess authority to impose conditions for the protection of railway employees who may be adversely affected as a result of the discontinuance of passenger service under section 13a(1). See *Great Northern Ry. Co. Discontinuance of Service*, 307 I.C.C. 59. However, the probable effect of such discontinuance on employees is a matter to be considered in determining whether the public convenience and necessity require the continuance of such service. We have considered that factor, and, in our opinion, the probable adverse effect upon employees does not afford sufficient grounds to order continuance of the service.

Contentions of the parties as to fact or law not specifically discussed herein have nevertheless been considered and found to be without merit or material significance.

We find that the operation by the Chicago & Eastern Illinois Railroad Company of passenger trains Nos. 93 and 54 between Chicago, Ill., and Evansville, Ind., is not required by the public convenience and necessity and that continued operation thereof would unduly burden interstate or foreign commerce.

An appropriate order will be entered discontinuing the investigation herein.

APPENDIX A

Statement of revenues and expenses for trains Nos. 31 and 32 in 1965, 1966 and 6 months of 1967

	1965		1966		Six Months 1967	
	Train No. 31	Train No. 32	Train No. 31	Train No. 32	Train No. 31	Train No. 32
Revenues:						
103 Coach (1)	$ 516,762	$ 480,139	$ 532,957	$ 468,569	$ 235,039	$ 197,399
107 Parlor cars (1)	90,033	122,097	87,680	113,393	33,431	45,173
109-110 Baggage & other (1)	4,606	483	2,370	153	1,970	315
106 Mail-RPO (1)	61,043	62,304	63,843	63,843	32,483	32,483
108 Mail-storage (1)	101,137	92,854	101,631	99,111	110,356	97,510
107 Express (1)	2,311	904	2,933	4,762	7,258	6,636
131 Dining & buffet (1)	65,870	65,873	67,844	67,844	34,910	34,910
Total Revenues	1,041,762	824,654	1,067,256	934,975	435,047	317,381
501-530 Car hire, net (1)	53,844	40,468	37,128	(1,000)	(1,000)	(14,000)
Total Income (1)	1,095,606	865,122	1,104,384	933,975	434,047	303,381
Total Expense (See below)	1,081,930	861,270	1,171,787	1,022,127	537,625	477,287
PROFIT OR (LOSS)	13,677	(36,148)	(67,403)	(88,152)	(103,578)	(173,906)
Maintenance of Equipment:						
311 Repairs, Diesel locomotives (3)	54,497	54,897	70,399	70,939	36,703	36,695
317 Passenger-train car: Repair (4)	89,300	77,311	176,053	163,072	75,937	70,866
331 Equip.Depre.(32)Loco.(5)	12,996	12,996	12,996	12,996	6,498	6,498
331 Equip.Depre.(34)Pass.Cars(6)	56,051	55,779	56,111	56,631	28,498	27,867
339 Emp.,Misc benefits (7)	2,334	2,175	2,918	2,841	1,799	1,250
Traffic:						
391-392 Passenger Traffic (8)	17,896	13,539	19,959	14,914	10,999	8,019
Transportation:						
373 Station employees (9)	67,605	28,766	66,723	29,770	34,154	11,641
376 Sta. supplies & exp. (10)	1,568	1,569	1,568	1,568	1,311	1,186
378 Yard Cond. & Othmn. (11)	1,436	1,436	1,681	1,681	1,311	1,186
382 Train engineers (1)	48,669	51,393	47,803	50,565	23,674	24,517
384 Train Fuel (3)	58,187	54,614	46,130	44,103	18,407	18,401
387 Water for train Loco. (3)	1,584	1,317	1,686	1,510	1,078	1,078
388 Lubr. for train Loco. (3)	3,748	3,744	3,127	3,156	2,345	2,349
389 Other supplies for train Loco. (3)	646	654	327	380	101	101
400 Engines, supplies train (3)	14,830	14,829	12,393	12,511	6,909	6,909
401 Trainmen (1)	61,181	61,861	64,631	63,037	29,278	29,201
407 Train supplies & exp. (12)	64,778	57,268	69,605	66,077	47,025	44,627
403 Operating sleeping cars (1)	44,199	44,303	41,171	41,581	20,530	18,668
409 Emps. Misc benefits (13)	7,727	6,134	6,906	5,988	3,439	2,668
Insurance (1)	13,173	13,172	13,178	13,178	6,744	6,744
415 Clearing wrecks (1)	---	---	4,987	---	---	---
419 Loss & Damage-baggage (1)	330	20	602	602	666	666
430 Injuries to persons (1)	28,350	2,377	22,787	2,991	11,000	1,847
441 Dining & buffet serv. (1)	69,161	69,161	76,839	76,839	33,594	33,594
General:						
452 Clerks, accounting (14)	13,566	13,566	10,972	10,292	4,571	4,139
456 Emps. Misc benefits (15)	580	574	626	604	180	162
451 Joint Facility Accounts (16)	212,554	219,158	266,112	236,092	119,869	113,697
532 Dp. tax accruals (17)	26,250	20,194	29,631	23,241	10,273	10,422
TOTAL EXPENSES:	1,081,930	861,270	1,171,787	1,022,127	537,625	477,287

NOTES:

(1) Actual.
(2) Revenue plus car hire.
(3) Passenger portion of account divided by passenger unit-miles times unit-miles per train.
(4) Passenger portion of account divided by passenger car-miles exclusive of sleeping car miles times actual car-miles per train.
(5) At I.C.C. rates distributed to trains on basis of units assigned.
(6) At I.C.C. rates distributed to trains on basis of actual car-miles.
(7) G.M.A. rates applied to labor portion of accounts Nos. 311 and 317.
(8) Distributed on basis of revenue per mile.
(9) Includes mail handlers, also (34) station employees.
(10) Three Nos. 31 and 32's portion of benefits equal expense.
(11) Evansville border - actual.
(12) Passenger portion of account divided by passenger car-miles including sleeping car-miles.
(13) G.M.A. rates applied to labor portion of accounts Nos. 373, 376, 382 and 400.
(14) Revenue per ream of actual wages.
(15) G.M.A. rates applied to labor portion of account No. 452.
(16) Seventy portion of joint facility expense at Chicago, Terre Haute, Vincennes and Evansville.
(17) R.R. and U.P. rates (G.M.A.) applied to labor portion of accounts Nos. 311, 317, 331 through 340, 373, 376, 382, 400, 452.

331 I.C.C.

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 3, held at its office in Washington, D. C., on the 25th day of January 1968.

Finance Docket No. 24725

CHICAGO & EASTERN ILLINOIS RAILROAD CO.—DISCONTINUANCE OF TRAINS NOS. 93 AND 54 BETWEEN CHICAGO, ILL. AND EVANSVILLE, IND.

Investigation of the matters and things involved in this proceeding having been made pursuant to the order of said division, dated September 18, 1967, a hearing having been held and the said division on the date hereof having made and filed a report containing its findings of fact and conclusions thereon, which report is hereby referred to and made a part hereof:

It is ordered, That this investigation be, and it is hereby discontinued, and that this order shall be effective 35 days from the date hereof.

By the Commission, division 3.

H. NEIL GARSON,

(SEAL) Secretary.

U.S. GOVERNMENT PRINTING OFFICE : 1970 O - 398-034

Supreme Court, U.S.
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E. ROBERT SEAVER, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1969

No. 396

LOUISVILLE AND NASHVILLE RAILROAD COMPANY, - - - - - - - - Appellant,

v.

TENNESSEE PUBLIC SERVICE COMMISSION, ET AL., - - - - - - - - - Appellees.

On Appeal From the United States District Court For The Northern District of Illinois

JURISDICTIONAL STATEMENT

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Due Date: July 17, 1970.

WESTERFIELD-BONTE CO., INC., 619 W. KENTUCKY, LOUISVILLE, KY.

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